Filed 2/17/09 Jeld-Wen, Inc. v. Axction Iron Works CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JELD-WEN, INC., Plaintiff and Appellant, v. ACTION IRON WORKS, INC., et al., Defendants and Respondents.	D051465 (Super. Ct. No. GIC789367)
JELD-WEN, INC., Plaintiff and Appellant, v. CAL-COAST CONSTRUCTION SPECIALTIES, INC., et al., Defendants and Respondents.	D053094 (Super. Ct. No. GIC789367)

APPEAL from judgments of the Superior Court of San Diego County, Luis R. Vargas, Judge. Reversed in part, affirmed in part; writ relief granted.

This case is back before us for a second time on appeal. In October 2008, we decided an appeal brought by plaintiff Jeld-Wen, Inc. (Jeld-Wen) (*Jeld-Wen v. Action Iron Works* (Oct. 29, 2008, D049908) [nonpub. opn.] (hereafter the October 2008 opinion)). The October 2008 opinion reviewed the trial court's rulings on the motions for summary judgment and motions for judgment on the pleadings brought by defendants Action Iron Works, Inc. (AIW); Foshay Electric Company, Inc. (Foshay); KAS Supply Company, Inc. (KAS); National Roofing Supply Consultants, Inc. (National Roofing); Pacific Coast Roofing Corporation (Pacific); Southcoast Sheet Metal (Southcoast); Wall Systems, Inc. (Wall); and Western Insulation, Inc. (Western). In this consolidated appeal, Jeld-Wen challenges trial court rulings made after it filed the previous appeal.

Jeld-Wen challenges (1) the trial court's ruling granting a motion for summary judgment and a motion for judgment on the pleadings brought by an additional defendant — Cal-Coast Construction Specialties, Inc. (Cal-Coast);[1] (2) the trial court's award of attorney fees to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast under Code of Civil Procedure section 1038 (section 1038); and (3) the trial court's award of attorney fees to Western, AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast under Civil Code section 1717 (section 1717).

With respect to the motion for summary judgment and motion for judgment on the pleadings in favor of Cal-Coast, we conclude (1) the trial court erred by granting

---

1 We will refer to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall, Western and Cal-Coast collectively as Defendants.

judgment on the pleadings in favor of Cal-Coast on the breach of contract cause of action; (2) the trial court properly granted Cal-Coast's motion for summary judgment on the causes for action for equitable contribution, equitable indemnity and declaratory relief.

With respect to the award of attorney fees to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast under section 1038, we conclude that due to reversal of the judgment by the October 2008 opinion, no appealable final judgment exists as to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall. However, we will treat the appeal as to those parties as a petition for writ of mandate, and we will consider the appeal as to Cal-Coast, as it was not the subject of the October 2008 opinion. For the reasons set forth below, we conclude that the award of attorney fees under section 1038 must be vacated.

With respect to the award of attorney fees to Western, AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast under section 1717, we treat the appeal as to Western, AIW, Foshay, KAS, Pacific, Southcoast and Wall as a petition for a writ of mandate. We conclude that the award of attorney fees as to AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast cannot stand, but as to Western we conclude that attorney fees were properly awarded under section 1717.

I

FACTUAL AND PROCEDURAL BACKGROUND

As we explained in the October 2008 opinion, Jeld-Wen entered into a contract with Pardee to install windows and sliding glass doors in homes being developed by

Pardee in a community known as Regency Hills, in Oak Park, Ventura County (the Project). In December 1997, rainwater began leaking into the homes — around the windows and elsewhere — and Pardee began receiving complaints from homeowners.[2] Pardee implemented repairs, which included removal and repair of the windows.

A. *The Pardee Litigation*

In an attempt to recover for the expenses it occurred as a result of the water intrusion remediation, Pardee filed a lawsuit against Jeld-Wen for, among other things, negligence, express indemnity, breach of implied warranty and breach of contract (the Pardee Litigation). After a jury trial, the court entered judgment against Jeld-Wen, awarding Pardee $1,701,543 (taking into account certain offsets, credits and adjustments) plus costs, including expert witness fees (the Pardee judgment). Jeld-Wen appealed, and we reversed the trial court's award of expert witness fees, but otherwise affirmed the Pardee judgment as to Jeld-Wen.[3] According to Jeld-Wen, it has paid the Pardee judgment, which amounted to $2,203,472 plus accrued interest.

---

[2] As we explained in the October 2008 opinion, according to Jeld-Wen there were multiple sources of water intrusion that Pardee incurred costs to remediate, and only some of the water intrusion was related to the leaking windows installed by Jeld-Wen.

[3] The Pardee Litigation and the subsequent appeal also included (1) Pardee's claim against another subcontractor, Eagles Plastering, Co., Inc. (Eagles), which was hired by Pardee to apply overlapping building paper, lath and stucco to the homes being constructed; (2) Jeld-Wen's cross-complaint against window installer Vision Glazing (Vision) for negligence, breach of contract and indemnity; and (3) Eagles' cross-complaint for equitable indemnity against Jeld-Wen and Vision. As relevant here, Eagles was awarded $10,461.90 against Jeld-Wen, and Jeld-Wen was awarded $160,650 against Vision, and those awards were affirmed on appeal. Further, in a special verdict form, the jury apportioned the fault of the various parties for Pardee's injuries as follows:

B. *Jeld-Wen Files This Litigation*

After the Pardee judgment was entered, Jeld-Wen filed this action against Defendants, all of whom Jeld-Wen alleged had worked as subcontractors on the Project.[4]

Jeld-Wen contended that the water intrusion at the Project was due to Defendants' acts or omissions, and that the Pardee judgment "includes costs incurred by Pardee to repair construction defects caused by each Defendant." The operative amended complaint (the complaint) asserted causes of action for (1) negligence; (2) equitable subrogation to Pardee's right to express indemnity; (3) equitable indemnity; (4) equitable contribution; (5) breach of contract on a third party beneficiary theory; and (6) declaratory relief as to whether Jeld-Wen was entitled to indemnification and/or contribution from Defendants.

Jeld-Wen, 15 percent; Eagles, 75 percent; and Pardee, 10 percent. The jury found that "Other person[s]" were zero percent responsible for the damage to Pardee. In another special verdict, relating to Jeld-Wen's claims against Vision, the jury apportioned fault for Jeld-Wen's injuries as follows: Vision, 27 percent; Jeld-Wen, 73 percent; and "Others," zero percent.

4 As we explained in the October 2008 opinion, evidence in the record showed that Defendants performed the following work at the Project: National Roofing acted as an inspector of certain aspects of the construction; Southcoast provided sheet metal work, including attic vents; Pacific performed roofing work; KAS performed the finish carpentry work, including installing french doors and exterior shutters; Western installed insulation; AIW installed ornamental metal; Wall installed drywall; and Foshay was an electrical subcontractor. Further, evidence presented in this consolidated appeal establishes that Cal-Coast provided framing work at the Project. Specifically, according to its subcontract agreement with Pardee, Cal-Coast was responsible for "rough carpentry lumber, trusses and joists," which Cal-Coast refers to in its briefing as "rough framing work."

C. *Motions for Judgment on the Pleadings on the Breach of Contract and Negligence Causes of Action*

After other proceedings had occurred, KAS, Pacific and AIW brought motions for judgment on the pleadings directed at the negligence and breach of contract causes of action, and Southcoast brought a motion for judgment on the pleadings directed only at the breach of contract cause of action. The trial court granted the motions.

Thereafter, Jeld-Wen entered into a stipulation with Foshay, Southcoast, Wall, AIW and Cal-Coast, agreeing that the trial court's ruling on KAS's motion for judgment on the pleadings with respect to both the negligence and breach of contract causes of action would apply as if each of the Defendants entering into the stipulation had filed its own motion for judgment on the pleadings on those two causes of action (the Stipulation).[5] The trial court approved the Stipulation.

D. *Motions for Summary Judgment on the Remaining Causes of Action*

Each of the Defendants brought motions for summary judgment challenging the remaining causes of action for equitable indemnity, equitable contribution and declaratory relief by focusing on what they asserted to be an undisputed fact: the Pardee judgment encompassed only Pardee's repair costs related to repair of the *windows*, and not the cost of repairs relating to any other source of water intrusion. Defendants argued

---

[5] Western did not enter into the Stipulation and instead successfully challenged the causes of action for negligence and breach of contract through its motion for summary judgment. There was no need for National Roofing to enter into the Stipulation because the trial court already had granted summary adjudication in its favor on the negligence and breach of contract causes of action.

that it was undisputed that their work at the Project did not give rise to costs that Pardee incurred in repairing the windows, and thus Jeld-Wen could not establish that Defendants were responsible under a theory of equitable indemnity or equitable contribution for a portion of the Pardee judgment. Defendants also challenged the equitable contribution cause of action on the ground that they were not co-obligors with Jeld-Wen on the Pardee judgment.

In their motions, Foshay, Pacific, KAS and Cal-Coast presented a further ground for summary judgment. They argued that because of the Pardee judgment, Jeld-Wen was collaterally estopped to argue that other subcontractors were responsible for any of the damages encompassed in the Pardee judgment.

Western, which had not earlier filed a motion for judgment on the pleadings as to the negligence and breach of contract causes of action, moved for summary judgment with respect to those causes of action, along with the causes of action targeted in the other Defendants' summary judgment motions.

After reviewing the evidence presented by the parties, the trial court granted the motions for summary judgment.[6] It concluded that "Jeld-Wen has not met its burden of

---

6 The summary judgment motions filed by KAS, Pacific, Foshay and Southcoast, Wall, AIW, National Roofing and Western were granted in September and October 2006, with judgment entered as to all of those parties on February 15, 2007. Cal-Coast's motion for summary judgment was granted in August 2007, with judgment entered as to Cal-Coast on September 17, 2007. Thus, Jeld-Wen's first appeal in this action, which was filed on December 4, 2006, was filed long before the trial court ruled on Cal-Coast's motion for summary judgment. For that reason, in this appeal we consider issues as to Cal-Coast that we already considered as to the other Defendants in the October 2008 opinion.

establishing a triable issue of material fact as to whether Jeld-Wen paid for non-window related water intrusion repair costs," and that "[the subcontractors have] conclusively established that all of the costs incurred by Pardee in repairing [the subcontractors'] allegedly improper work were excluded from the costs sought and paid by Jeld-Wen in the underlying trial." The trial court concluded that "[a]bsent evidence that Jeld-Wen paid for non-window related water damage intrusion repair costs," Jeld-Wen could not prevail on its causes of action for equitable indemnity, equitable contribution and declaratory relief, because each of those causes of action depended on the allegation that Jeld-Wen had made payment to Pardee for repair costs caused by the Defendants' improper work.

Ruling on the collateral estoppel argument raised by Foshay, Pacific, KAS and Cal-Coast, the trial court concluded that the causes of action for equitable indemnity, equitable contribution and declaratory relief also failed because they were barred by the doctrine of collateral estoppel.

Ruling on Western's motion for summary judgment, which also challenged the causes of action for negligence and breach of contract, the trial court granted Western a judgment in its favor.

E. *Jeld-Wen's First Appeal in This Action*

Jeld-Wen's first appeal in this action, which we addressed in the October 2008 opinion, challenged the judgments entered in favor of all of the Defendants except for Cal-Coast. In our October 2008 opinion we (1) reversed the trial court's order granting judgment on the pleadings on the breach of contract cause of action in favor of KAS,

AIW, Southcoast, Pacific, Foshay and Wall; (2) reversed the ruling in favor of National Roofing on its motion for summary judgment on the causes of action for equitable indemnity and declaratory relief; and (3) affirmed the judgment in all other respects. As a result of our ruling, only the judgment against Western was allowed to stand, and the action was returned to the trial court for further proceedings with respect to KAS, AIW, Southcoast, Pacific, Foshay, Wall and National Roofing.

F. *The Trial Court's Rulings Awarding Attorney Fees*

While the first appeal in this action was pending, the trial court ruled on motions brought by the Defendants to recover their attorney fees and costs.

1. *Award of Attorney Fees Under Section 1038*

First, each of the Defendants, except Western, brought a motion for an award of attorney fees and costs under section 1038 on the ground that Jeld-Wen's action contained causes of action for equitable indemnity and equitable contribution, and the action was not brought in good faith or with reasonable cause.[7]

---

[7] Section 1038 provides in part: "(a) In any civil proceeding under the California Tort Claims Act or for express or implied indemnity or for contribution in any civil action, the court, upon motion of the defendant or cross-defendant, shall, at the time of the granting of any summary judgment . . . determine whether or not the plaintiff . . . brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint . . . . If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party."

The trial court granted the motions, but only with respect to those fees and costs incurred after a certain date. Because the section 1038 motions were filed on different dates by different parties, the trial court issued several different orders ruling on the motions.

In ruling on the motions filed by National Roofing, Southcoast, Foshay and KAS, the trial court reasoned that by June 22, 2006, deposition testimony by Pardee's trial counsel and the Pardee executive responsible for calculating Pardee's damages established that all of the costs not related to window repairs were removed from the damages sought in the Pardee action, and thus after that date Jeld-Wen no longer had reasonable cause to pursue the action. Accordingly, as to National Roofing, Southcoast, Foshay and KAS, the trial court ruled that they should recover attorney fees incurred after June 22, 2006, through the final disposition of the section 1038 motion.

In its ruling on Cal-Coast's section 1038 motion, the trial court employed the same reasoning. The result was slightly different however, because the trial court stated in the ruling on Cal-Coast's motion that the relevant depositions had taken place by June 12, 2006 (rather than June 22, 2006).[8] Further, because Cal-Coast had declined to enter into a stipulated summary judgment ruling with Jeld-Wen on October 30, 2006, the trial court limited the fees Cal-Coast could recover to those incurred between June 12, 2006, and

---

8 According to the record, the depositions appear to have been concluded by June 12, 2006. The trial court's mention of June 22, 2006, in the ruling concerning National Roofing, Southcoast, Foshay and KAS may have been a clerical error.

October 30, 2006, with the exception of those fees incurred in bringing the section 1038 motion.

In ruling on the motions filed by AIW, Wall and Pacific the trial court employed a different analysis. The trial court ruled that because the depositions of Jeld-Wen's construction experts had finished by August 31, 2006, with no evidence that AIW, Wall and Pacific performed substandard work that caused water intrusion at the Project, Jeld-Wen demonstrably lacked reasonable cause to maintain the action as to AIW, Wall and Pacific after that date.[9] Thus, the trial court awarded AIW, Wall and Pacific the attorney fees they incurred from September 1, 2006, through the date of the disposition of their section 1038 motions.

After reviewing supplemental briefing, the trial court decided upon the amount of attorney fees to be awarded. The trial court then interlineated the judgments that it had already entered as to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall to include awards of attorney fees under section 1038.[10]

---

9 The January 12, 2007 order in which the trial court ruled on AIW's, Wall's and Pacific's section 1038 motions was, perhaps inadvertently, not included in the appellate record. We have obtained a copy of the document and on our own motion take judicial notice of it.

10 With respect to the award of fees in favor of Cal-Coast, the appellate record contains no indication that the trial court followed the proper procedure under section 1038 of rendering judgment in the amount of the fee award. (§ 1038, subd. (a).) Instead, the fee award was apparently set forth only in a separate postjudgment order.

2. *Award of Attorney Fees Under Section 1717*

All of the Defendants except National Roofing also filed motions for attorney fees pursuant to section 1717. The motions were based on the attorney fee clauses in the subcontracts that the Defendants had entered into with Pardee. Defendants argued that they were entitled to recover attorney fees because Jeld-Wen had relied on the subcontracts as the basis for its breach of contract cause of action.

The trial court granted the motions for attorney fees under section 1717, but only as to those fees incurred from the inception of the action through the granting of the motions for judgment on the pleadings on the breach of contract cause of action, or in the case of Western, through the granting of Western's motion for summary judgment on the breach of contract cause of action.

G. *This Consolidated Appeal*

This consolidated appeal, which Jeld-Wen filed before we issued the October 2008 opinion, challenges (1) the ruling granting Cal-Coast's motion for judgment on the pleadings with respect to the breach of contract cause of action; (2) the ruling granting Cal-Coast's motion for summary judgment on the causes of action for equitable indemnity, equitable contribution and declaratory relief; (3) the award of attorney fees to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast under section 1038; and (4) the award of attorney fees to AIW, Foshay, KAS, Pacific, Southcoast, Wall, Western and Cal-Coast under section 1717.

II

DISCUSSION

A. *Jeld-Wen's Challenge to the Ruling Granting Judgment on the Pleadings in Favor of Cal-Coast on the Breach of Contract Cause of Action*

We first consider Jeld-Wen's argument that the trial court erred in granting judgment on the pleadings as to the cause of action for breach of contract in favor of Cal-Coast.

1. *Standards Applicable to a Motion for Judgment on the Pleadings*

"A motion for judgment on the pleadings is akin to a general demurrer; it tests the sufficiency of the complaint to state a cause of action. [Citation.] The court must assume the truth of all factual allegations in the complaint, along with matters subject to judicial notice. [Citation.] Appellate courts review judgments on the pleadings de novo." (*Wise v. Pacific Gas & Electric Co.* (2005) 132 Cal.App.4th 725, 738.) "Presentation of extrinsic evidence is . . . not proper on a motion for judgment on the pleadings." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.)

2. *The Relevant Allegations of the Complaint and Cal-Coast's Position in Support of the Trial Court's Ruling*

The basis for Jeld-Wen's cause of action for breach of contract was a purported contractual provision appearing in the relevant contract between Pardee and Cal-Coast, which Jeld-Wen contends made it a third party beneficiary to that contract. According to the complaint,

> "Defendants, and each of them, entered into a written contract with Pardee to perform their work at the [Project] free of defects and in a good and workmanlike manner and to review other subcontractors' work at the

> [Project] and notify Pardee of faulty substandard and negligent work of other subcontractors at the [Project] prior to commencing their own scope of work."

More generally, the complaint also alleged that "the parties to the contract[s] intended to benefit other individual subcontractors conducting work at the [Project]," and that Jeld-Wen "was an intended third party beneficiary to the [c]ontract between Defendants and Pardee." The relevant contracts, including Cal-Coast's contract with Pardee, were *not* attached as exhibits to the complaint.

Cal-Coast argues that based on the complaint's description of the contractual provisions, Jeld-Wen has not pled facts sufficient to state a cause of action for breach of contract based on a third party beneficiary theory, because Jeld-Wen is, at best, no more than an incidental beneficiary of the contract.

3. *Applicable Legal Principles*

We next turn to a review of the law concerning a claim for breach of contract under a third party beneficiary theory. The authority for a third party to enforce a contractual provision is set forth in Civil Code section 1559, which provides that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." "[I]t is well settled that Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it." (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1724.) "'The fact that the third party is only incidentally named in the contract or that the contract, if carried out to its terms, would inure to the third party's benefit is insufficient to entitle him or her to demand enforcement.'" (*Bancomer, S. A. v. Superior*

Court (1996) 44 Cal.App.4th 1450, 1458.) Instead, "'[a] third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that third party and such intent appears on the terms of the contract. [Citation.] . . . [¶] . . . Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered.'" (*Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1064 (*Johnson*).)

Although "it is a question of fact whether a particular third person is an intended beneficiary of a contract" (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233 (*Prouty*)), "where . . . the issue can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently." (*Ibid.*)

4. *The Trial Court's Ruling*

In opposing the motion for judgment on the pleadings on the breach of contract cause of action, Jeld-Wen argued in the trial court that because the resolution of the third party beneficiary issue required a review of the relevant contracts, the matter would have to be decided in a motion for summary judgment rather than in a motion for judgment on the pleadings.

The trial court rejected this argument and ruled against Jeld-Wen. It stated that ". . . Jeld-Wen has not alleged facts sufficient to establish that it is a third-party beneficiary to the [relevant contract with Pardee]. [Citation.] The obligations in the

contract to perform in a workmanlike manner, and to notify of defective work, inured to the benefit of Pardee and not the other subcontractors."[11] Further the trial court stated that the fact that the moving parties "did not provide a copy of [their] contract[s] with Pardee is not dispositive as a motion for judgment on the pleadings is based on the contents of the pleading."

The trial court erred in granting judgment on the pleadings on the breach of contract cause of action without having the relevant contracts before it.[12] In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199.) Jeld-Wen followed this approach by plainly alleging that the effect of the contract was to make it a third party beneficiary of Defendants' contracts with Pardee. As we have explained, "it is a question of fact whether a particular third person is an intended beneficiary of a contract" (*Prouty*, *supra*, 121 Cal.App.4th at p. 1233), and "'[w]hether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, *gleaned from reading the contract as a whole* in light of the circumstances under

---

11 This statement was made by the trial court in the context of ruling on the motion for judgment on the pleadings brought by KAS. As we have explained, Cal-Coast did not bring a motion for judgment on the pleadings on the breach of contract cause of action but instead entered into a stipulation under which the ruling on the other parties' motions was deemed to apply to Cal-Coast as well.

12 We reached the same conclusion in the October 2008 opinion with respect to Jeld-Wen's appeal of the motion for judgment on the pleadings on the breach of contract cause of action in favor of KAS, AIW, Southcoast, Pacific, Foshay and Wall.

which it was entered.'" (*Johnson, supra,* 80 Cal.App.4th at p. 1064, italics added.) The trial court did not base its ruling on a reading of the whole of the relevant contracts. Indeed, the trial court did not have before it any of the relevant language from the contracts. All that was contained in the pleadings was Jeld-Wen's one-sentence *description* of the contractual provisions that it contended were intended to confer a benefit upon it. Thus, without the relevant contractual language before it, the trial court had no proper basis upon which to rule that Jeld-Wen was not a third party beneficiary to the contracts, and it accordingly erred in so ruling.

Cal-Coast argues that *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057 establishes that a court may decide, in the context of a judgment on the pleadings, whether the plaintiff is a third party beneficiary of a contract. *Burnett* is not applicable here. In that case, an unsigned copy of the relevant contract was attached as an exhibit to the complaint, and the moving party, without objection, submitted a signed copy of the contract along with its motion for judgment on the pleadings. (*Id*. at pp. 1063-1064.) Because the court in *Burnett* had before it the complete contract, it was able to decide, as a matter of law, whether the plaintiff was a third party beneficiary. Here, in contrast, the relevant contracts were not before the trial court when it ruled on the motions for judgment on the pleadings. The trial court thus necessarily and improperly based its decision on the brief description of the contracts that appeared in the complaint.

B. *Jeld-Wen's Challenge to the Ruling on the Motions for Summary Judgment Concerning the Causes of Action for Equitable Indemnity, Equitable Contribution and Declaratory Relief*

We next examine the trial court's ruling on Cal-Coast's motion for summary judgment on the causes of action for equitable indemnity, equitable contribution and declaratory relief.

1. *Standards Applicable to a Motion for Summary Judgment*

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment or summary adjudication is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense. (*Ibid.*) "[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action[;] the defendant need not himself conclusively negate any such element . . . ." (*Id.* at pp. 853-854.) "A defendant moving for summary judgment may establish that an essential element of the plaintiff's cause of action is absent by reliance on the pleadings, competent declarations, binding judicial admissions contained in the allegations of the plaintiff's complaint, responses or failures to respond to discovery, and the testimony of witnesses at noticed depositions." (*Eisenberg v. Alameda Newspapers,*

Inc. (1999) 74 Cal.App.4th 1359, 1375.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar*, at p. 851.)

If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. (*Aguilar, supra,* 25 Cal.4th at p. 849; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) "'When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647.)

Ultimately, the moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th at p. 850.)

We review a summary judgment or summary adjudication ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) "[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

Cal-Coast argued in support of its motion for summary judgment that the undisputed evidence showed that the Pardee judgment encompassed only Pardee's losses arising out of repairs to the windows, and that the judgment did not include any amount incurred by Pardee for repairing framing defects. Based on these purportedly undisputed facts, Cal-Coast argued that Jeld-Wen could not prevail on its causes of action for equitable indemnity, contribution and declaratory relief. Cal-Coast also argued that the cause of action for equitable contribution failed because it was not a co-obligor with Jeld-Wen on the Pardee judgment.[13]

2. *The Cause of Action for Equitable Contribution Fails Because No Money Judgment Was Entered Against Cal-Coast Jointly with Jeld-Wen*

As an initial matter, we consider the challenge to the cause of action for equitable contribution. Jeld-Wen's cause of action for equitable contribution appears to be based on the theory that Cal-Coast is a joint tortfeasor responsible for Pardee's damages and thus should be required to contribute to Jeld-Wen's payment of the Pardee judgment. Recovery for equitable contribution among joint tortfeasors is governed by Code of Civil Procedure section 875. (See *Coca-Cola Bottling Co. v. Lucky Stores, Inc.* (1992) 11 Cal.App.4th 1372, 1378 (*Coca-Cola Bottling*) ["Contribution . . . is a creature of statute and distributes the loss equally among all tortfeasors [and] requires a showing that one of

---

13 As an additional ground for summary judgment, Cal-Coast argued that the collateral estoppel arising from the Pardee judgment barred Jeld-Wen's causes of action for equitable indemnity, contribution and declaratory relief. Because we will affirm the trial court's summary judgment ruling in favor of Cal-Coast on other grounds, we need not, and do not, reach the collateral estoppel issue.

several joint tortfeasor judgment debtors has paid more than a pro rata share of a judgment" (fn. omitted)].)

Code of Civil Procedure section 875 provides: "Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided." (*Id.*, subd. (a).) The statute provides that "[s]uch right of contribution shall be administered in accordance with the principles of equity." (*Id.*, subd. (b).) Thus, the right to equitable contribution does not arise unless, as the statute plainly provides, a money judgment has been rendered jointly against the party seeking contribution and the party from whom contribution is sought. (*Coca-Cola Bottling*, *supra*, 11 Cal.App.4th at p. 1378 ["A right of contribution can come into existence only after rendition of a judgment declaring more than one defendant jointly liable to the plaintiff"]; *Winzler & Kelly v. Superior Court* (1975) 48 Cal.App.3d 385, 395; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 108, pp. 204-205 [explaining necessity of joint judgment for recovery of contribution].)

Here, the undisputed evidence shows that Cal-Coast is not a party to a money judgment rendered jointly against it and Jeld-Wen. Accordingly, the cause of action for equitable contribution fails, and we therefore affirm the trial court's ruling on the motion for summary judgment on the equitable contribution cause of action against Cal-Coast.

3. *The Causes of Action for Equitable Indemnity and Declaratory Relief Required Jeld-Wen to Establish that Cal-Coast Shares Fault for the Damages to Pardee Encompassed in the Pardee Judgment*

We next examine the trial court's ruling with respect to the causes of action for equitable indemnity and declaratory relief.

"Equitable indemnity principles govern the allocation of loss or damages among multiple tortfeasors whose liability for the underlying injury is joint and several. [Citations.] Such principles are designed, generally, to do equity among defendants who are legally responsible for an indivisible injury by providing a basis on which liability for damage will be borne by each joint tortfeasor '"in direct proportion to [its] respective fault."'" (*Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc.* (2001) 86 Cal.App.4th 1135, 1139-1140.) "The elements of a cause of action for indemnity are (1) a showing of *fault* on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible." (*Id*. at p. 1139.) In short, to prevail on a equitable indemnity claim against Cal-Coast, Jeld-Wen would have to establish that Cal-Coast shared fault for the damages assessed against Jeld-Wen in the Pardee judgment. Cal-Coast argues that because the Pardee judgment did not encompass any damages related to the repair of framing defects, Jeld-Wen cannot establish that Cal-Coast shared fault for the damage for which Pardee recovered from Jeld-Wen through the Pardee judgment.

Jeld-Wen's claim for declaratory relief seeks a declaration that Cal-Coast is obligated to indemnify it. Jeld-Wen concedes that to defeat Cal-Coast's summary judgment motion on the declaratory relief cause of action, Jeld-Wen "was required to show that it paid for some portion of the [Pardee judgment] which was more than its equitable share or responsibility." In short, if the cause of action for equitable indemnity fails on the ground that Cal-Coast is not equitably required to make payment for some of the Pardee judgment, the declaratory relief cause of action necessarily fails as well.

In sum, Cal-Coast's motion for summary judgment on the causes of action for equitable indemnity and declaratory relief turn on whether Jeld-Wen can establish that Cal-Coast shares fault for the damages that are encompassed in the Pardee judgment.

a. *The Evidence Presented by Cal-Coast in Support of Its Motion for Summary Judgment*

To evaluate whether the trial court properly granted summary judgment in favor of Cal-Coast on the equitable indemnity and declaratory relief causes of action, we first focus on the evidence submitted by Cal-Coast to establish that the Pardee judgment did not encompass any damages incurred by Pardee by virtue of Cal-Coast's conduct as the framer on the Project.

First, Cal-Coast relied on excerpts from the deposition of Robert Carlson, who was Pardee's lead trial counsel in the Pardee Litigation. Carlson testified that when litigating the Pardee Litigation, Pardee presented to the jury evidence of damages related *only* to window repairs. Carlson testified that he specifically instructed Pardee to "take out everything not related to the window repairs from their amount, and that's the amount we presented to the jury."

Second, Cal-Coast submitted excerpts from the deposition of Pardee's senior vice president of finance, William Bryan. Bryan testified that during the Pardee Litigation, at the direction of trial counsel, he undertook to remove all costs incurred by Pardee that were not related to window removal or repairs. Bryan explained that the total amount for repair and associated work for the water intrusion at the Project, regardless of the cause, was approximately $2.8 million. After the items not related to removing and repairing

the windows were subtracted by Bryan, the jury was presented with the amount of $1,819,770 as a damages figure.

Finally, Cal-Coast submitted excerpts from the deposition of Megan Dorsey. Dorsey, who was also counsel to Pardee in the Pardee Litigation, testified that she specifically instructed Pardee not to include in its calculation of damages items unrelated to the windows. She stated that Pardee's intent "was to only present damages that related to the windows, . . . and that's what was presented to the jury." Significantly, Dorsey testified that Pardee did not seek reimbursement from Jeld-Wen in the Pardee Litigation for any framing repairs at the Project.

In sum, through the deposition testimony of Bryan, Carlson and Dorsey, Cal-Coast put forth evidence, which if unchallenged, would establish that the Pardee judgment included *only* the costs incurred by Pardee to remove and repair the windows, and that the Pardee judgment specifically did not include any costs relating to the framing repairs at the Project. By relying on the deposition testimony of Bryan, Carlson and Dorsey to establish that no costs relating to framing repairs at the Project were included in the Pardee judgment, Cal-Coast carried its initial burden on summary judgment as to the equitable indemnity and declaratory relief causes of action because the evidence establishes that Cal-Coast does not share fault for the damages encompassed in the Pardee judgment.

On appeal, Jeld-Wen argues that we should not consider Carlson's and Dorsey's deposition testimony because it is purportedly not based on personal knowledge. Jeld-Wen argues that Carlson's and Dorsey's testimony lacks probative value because

their statements about the damages presented at trial were purportedly based on conversations with Bryan, and "[n]either attorney verified that Mr. Bryan actually removed any monies from Pardee's damage claim." We reject this argument. Dorsey and Carlson both testified to a subject of which they had personal knowledge, i.e., (1) the instructions that they gave to Bryan that he remove repair costs not related to window repairs, and (2) their use at trial of the information that Bryan provided to them.[14] Bryan, in turn, testified that he followed the directions provided by Carlson and Dorsey.

b. *Jeld-Wen's Evidence*

In response to the evidence establishing Cal-Coast's prima facie showing, Jeld-Wen relied primarily on a declaration from its trial counsel in the Pardee Litigation and on deposition testimony from its expert witnesses in an attempt to create a triable issue of fact as to whether the damages encompassed in the Pardee judgment went beyond the costs relating to removing and repairing the windows and included the costs of repairs related to framing defects.

---

14 To the extent that Jeld-Wen is attempting to reassert evidentiary objections rejected by the trial court, that approach fails. Specifically, Jeld-Wen objected in the trial court to Carlson's and Dorsey's deposition testimony on the ground, among others, that the testimony lacked foundation in personal knowledge and contained inadmissible hearsay. The trial court overruled the objections on the ground that Jeld-Wen had not specified the page and line number of the deposition testimony as required by California Rules of Court, rule 3.1354. A trial court's evidentiary rulings will be affirmed on appeal unless the appellant establishes an abuse of discretion. (See *People v. Waidla* (2000) 22 Cal.4th 690, 717.) Jeld-Wen has made no attempt to establish that the trial court abused its discretion by overruling the objections for lack of conformity with rule 3.1354.

First, Jeld-Wen submitted deposition testimony from Mark Linden and Gordon Woodard — two construction industry professionals who opined about the cause of the water intrusion problems at the Project. Linden testified that he had identified defects in the framing work at the Project that might have led to water intrusion around the windows and other areas. Woodard similarly testified that he was aware of some defects in the work performed by the framer that he believed resulted in water intrusion at the Project. Linden "assume[d]" that Pardee undertook to correct the framing defects, but also stated that he had no specific knowledge about whether framing repairs were carried out.

We do not find the testimony of Linden and Woodard, standing alone, to be dispositive of the issue we are considering. The issue before us is whether the Pardee judgment encompassed costs, direct or indirect, related to repair of defects in the framing work performed by Cal-Coast, or, in contrast, whether the Pardee judgment was limited to costs related to the removal and repair of the windows. The testimony of Linden and Woodard addresses part of that subject, because it addresses whether there were defects in the framing work at the Project that led to water intrusion, and whether Pardee might have incurred costs because of those defects. However, the testimony does not address the crucial question of whether the costs, if any, incurred by Pardee in addressing the framing defects were included in the Pardee judgment.[15] Thus, the testimony of Linden

---

15 Indeed, in its reply briefing in the trial court Cal-Coast submitted additional excerpts from Linden's and Woodard's deposition testimony in which they stated that

and Woodard, standing alone, does not serve to rebut Cal-Coast's prima facie showing that the Pardee judgment encompassed *only* costs arising from the removal and repair of the windows and did not include costs to repair framing defects.

Second, Jeld-Wen submitted excerpts from a deposition of its expert accountant, Glenn Gelman. Gelman testified that he had reviewed a "job cost report," and associated invoices, presumably produced by Pardee. According to Gelman's analysis, which was reflected in a report that he drafted, (1) $54,223 of the costs reflected in those documents related to replacing or making repairs on the windows; (2) $1,867,131 of the costs were related to specific tasks involved in repairing damage due to water intrusion, but not related to window replacement or repair; (3) $179,523 of the costs did not appear to relate directly to the repair of damage due to water intrusion; and (4) $238,533 of the costs represented settlements to homeowners.

The trial court considered Gelman's testimony, along with his report. It also considered additional excerpts from Gelman's deposition testimony submitted by Cal-Coast. The trial court stated that it "finds Gelman's testimony speculative on the issue of whether Jeld-Wen paid for non-window water intrusion repair costs," and that "Gelman has not provided sufficient foundation for his opinions." As we will explain, we agree with the trial court.

---

they did not know whether the judgment in the Pardee Litigation included any costs incurred as a result of any framing defects.

First, in explaining his analytical method, Gelman made clear that he did not attempt to identify all of the costs that Pardee incurred as a result of removal and repair of the windows. Instead, Gelman excluded all costs that were not "strictly replacing a window, cleaning a window, or maintaining a window." For example, he testified that when he saw a cost entry relating to caulking windows, he would not include that as a cost relating to repairing the damage caused by water intrusion from the leaking windows. Similarly, he did not include any costs related to removing stucco so that a window could be removed from a wall, or removing stucco debris due to window repair. Gelman admitted that "not being a contractor or an engineer," he "would have no idea of what goes into a window," and that if he did not know why a certain cost was incurred, he would categorize it as not relating to repairing water intrusion from the leaking windows. Gelman stated that "[i]f the invoice referred to anything other than window, if it had the word 'stucco,' 'drywall,' 'plaster,' 'cleanup,' 'supervise,' if it had other wording," he did not categorize it as a cost relating to replacing or repairing the windows. Thus, Gelman's opinion is not helpful in determining the costs to Pardee in removing and replacing the leaking windows.

Second, Gelman admitted that he did not have the information he needed to properly identify costs incurred as a result of repairing the damage caused by the leaking windows, because some of the entries on the accounting report he was using to prepare his report were not accompanied by invoices. He assumed that those entries unaccompanied by invoices were not related to removing and repairing the leaking windows, even where the description on the accounting report stated "window repair."

Third, it is evident from Gelman's deposition testimony that he was not relying for his analysis on the same information that Pardee relied upon to arrive at the damages figure submitted to the jury. Gelman testified during his deposition that he relied for his analysis on a "422 report" from Pardee dated March 23, 2000, indicating total costs of $2,339,409.55. Gelman stated that his client, Jeld-Wen, had informed him that the 422 report was the source of the damages calculation used at trial. However, as Cal-Coast established through Bryan's testimony, the total amount spent by Pardee on the repairs arising out of water intrusion was roughly $2.8 million. Gelman, in contrast, was using a report showing $2,339,409.55 in total remediation costs incurred by Pardee.

Finally, Gelman testified that he did not know the amount of damages that Pardee had claimed at trial. He also testified that he did not attempt to reconcile any amount claimed by Pardee at trial with any invoiced amount he believed was not related to window repair to determine if it was claimed as a part of Pardee's damages.

Based on all of this evidence, we conclude, as did the trial court, that Gelman did not have a proper foundation to testify that any particular item of damages contained in the Pardee judgment was not related to removal and repair of the leaking windows, and that any opinion he purported to offer on that issue was speculative. "In adjudicating summary judgment motions, courts are 'not bound by expert opinion that is speculative or conjectural. [Citations.] Plaintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning.'" (*Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1415.) "'The evidence must be of sufficient quality to allow the trier of fact to find

the underlying fact in favor of the party opposing the motion for summary judgment.'" (*Ibid.*) "[A]n expert's opinion based on assumptions of fact without evidentiary support . . . , or on speculative or conjectural factors . . . , has no evidentiary value . . . ." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117, citations omitted.) The trial court thus properly disregarded Gelman's opinion as speculative and made without a proper foundation.[16]

In support of its opposition to Cal-Coast's summary judgment motion, Jeld-Wen also relied on a declaration from Jeld-Wen's trial counsel in the Pardee Litigation, Richard Sieving. Sieving stated that the Pardee judgment included "costs associated with specific repairs to the defective conditions as well as the operational and investigative costs to repair the residences including, but not limited to, the cost of superintendent supervisors, temporary facilities, outside manpower, investigation and testing, cleanup, painting, equipment rental, vandalism, theft, gas, repairs to trucks and settlements to homeowners." The trial court concluded that Sieving's declaration did not raise a triable issue of fact as to whether Jeld-Wen was held liable in the Pardee judgment for costs not arising out of window-related repairs.

---

16 Citing *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125, Jeld-Wen argues that a declaration in opposition to a motion for summary judgment "'is entitled to all favorable inferences that may be reasonably derived from that declaration.'" This argument fails because even when we derive all favorable inferences, Gelman's declaration cannot be read to lend support to Jeld-Wen's case as it is speculative and made without proper foundation.

Considering the content of Sieving's declaration, we conclude it is not sufficient to rebut Cal Coast's prima facie showing that Pardee excluded from the Pardee judgment *all* damages that did not arise out of the removal and replacement of the windows.

As a preface to our discussion, we note that there are two general categories of costs that Pardee incurred in remediating the water intrusion at the Project: (1) direct costs attributable to the performance of a specific task, such as replacing windows, repairing stucco etc.; and (2) indirect overhead costs of a project-wide nature, such as hiring supervisors or investigating the sources of water intrusion. Sieving does not state that the Pardee judgment included any *direct* costs that were not attributable to remediation of the leaking windows. He does, however, identify several categories of costs that could be described as *indirect* overhead costs of project-wide repairs.[17] Relying on the indirect costs identified by Sieving, Jeld-Wen argues that "Pardee's damages consisted of not only repair costs of specific defects *but also operational costs needed to effectuate all the repairs*[,]" and that "[a]ll of these costs were included in the damages sought by Pardee in the [Pardee Litigation] and included in the [Pardee judgment]." (Italics added.)

However, Sieving's declaration does not contain sufficient information to support Jeld-Wen's argument that the trial court judgment included indirect costs that were not attributable to leaking windows. This is because Sieving does not state Jeld-Wen was

---

17 These categories include "superintendent supervisors," "temporary facilities," "investigation and testing," "cleanup," "equipment rental," "vandalism" and "theft."

found liable in the Pardee Litigation for *all* of the indirect costs in the categories that Sieving identified, and he does not state that Pardee failed to apportion the indirect costs when calculating the amount of damages presented to the jury in the Pardee Litigation. Accordingly, Sieving's declaration does not serve to create a triable issue of fact as to whether Jeld-Wen, in paying the Pardee judgment, bore the indirect costs attributable to work other than removal and repair of the windows.[18]

Jeld-Wen also argues that the trial court "improperly weighed evidence" in that it rejected Gelman's, Woodard's, Linden's and Sieving's testimony in favor of the evidence submitted by Cal-Coast. This argument fails because the trial court did not weigh the parties' respective evidence. Instead, the trial court properly rejected the evidence submitted by Gelman as speculative and without foundation and rejected Woodard's, Linden's and Sieving's testimony because it did not serve to prove that the Pardee judgment included costs, direct or indirect, not attributable to water intrusion from the leaking windows.

In sum, having considered all of the evidence presented in connection with the motion for summary judgment, we conclude that Cal-Coast met its burden to show that Jeld-Wen could not establish that the judgment in the Pardee Litigation went beyond the costs associated with removal and repair of the windows and included costs arising from the repair of any framing defects that might have caused water intrusion.

---

[18] Further, although Sieving states that the Pardee judgment included "settlements to homeowners," Sieving does not state that any of those settlement payments were to compensate homeowners for damages *not* arising from window removal and repair.

Accordingly, the trial court properly granted summary judgment in favor Cal-Coast on the causes of action for equitable indemnity and declaratory relief.

C. *Jeld-Wen's Challenge to the Trial Court's Award of Attorney Fees Under Section 1038*

We next address Jeld-Wen's challenge to the trial court's award of attorney fees to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast pursuant to section 1038.

A court may make an award of attorney fees under section 1038 after granting a motion for summary judgment, a motion for directed verdict, a motion for judgment under Code of Civil Procedure 631.8, a motion for nonsuit on a claim for indemnity or contribution, or a claim under the California Tort Claims Act. (§ 1038, subd. (a).) After making a determination, upon motion of the defendant, that the proceeding was not brought "with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law," the trial court is directed by statute to decide, as "an additional issue," the defense costs "reasonably and necessarily incurred" in opposing the proceeding. (*Ibid*.) The trial court shall then "render judgment . . . in the amount of all reasonable and necessary defense costs." (*Ibid*.)

Here, the trial court proceeded, as directed by statute, in two separate steps. First, it determined, upon motions brought by AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast pursuant to section 1038, after they prevailed on summary judgment, that Jeld-Wen had maintained its causes of action for equitable indemnity and contribution without reasonable cause. Second, after receiving further

briefing from the parties, it determined the amount of defense costs reasonably and necessarily incurred, and it amended the judgments to include those costs it determined Jeld-Wen should pay. The portion of the ruling challenged in Jeld-Wen's appeal is the first part of the two-step process, in which the trial court determined that the parties were entitled to an award of attorney fees because Jeld-Wen did not have reasonable cause to maintain the action. Jeld-Wen is not challenging the second step of the court's ruling, in which it determined the amount of attorney fees to be awarded.

1. *We Lack Jurisdiction Over Jeld-Wen's Appeal as to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall, but Will Treat the Appeal as a Petition for Writ of Mandate*

As a result of our October 2008 opinion, the judgments entered in favor of AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall have been reversed, and the remittitur has issued as to our October 2008 opinion. Thus, no final judgment exists as to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall. "[A]n appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 (*Morehart*).) Accordingly, we lack jurisdiction over Jeld-Wen's appeal from the orders awarding attorney fees to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and

Wall because no final judgment currently exists as to those parties.[19] As to Cal-Coast, however, because a remittitur has not yet issued reversing the judgment, we have jurisdiction to consider Jeld-Wen's appeal of the attorney fee issue.

Although we have concluded that we do not have appellate jurisdiction over the appeal as to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall because of the lack of a final judgment, we will, as requested by those parties, exercise our discretion to treat the appeal, with respect to those parties, as a petition for a writ of mandate challenging the trial court's ruling that attorney fees should be awarded under

---

19 AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall argue that two exceptions to the final judgment rule apply here. First, they argue that the collateral order doctrine applies. Under that doctrine, "[w]hen a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken." (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.) However, the collateral order doctrine does not apply unless the order at issue is *final*, meaning that no further judicial action is required on the matters treated in the order. (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228.) Here, because the compulsion for Jeld-Wen to pay attorney fees to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall was contained in the judgment, and our October 2008 opinion reversed that judgment, the trial court would have to take further judicial action (by issuing a future final judgment) before Jeld-Wen is required to pay any amount to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall. Accordingly, the order appealed from is not final for the purposes of the collateral order doctrine, and the doctrine thus does not apply. Second, AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall argue that the orders requiring the payment of attorney fees under section 1038 are appealable under Code of Civil Procedure section 904.1, subdivision (a)(12), which permits a party to appeal from "an order directing payment of monetary sanctions" exceeding $5,000. This provision is not applicable here because an award of attorney fees under section 1038 is not an order directing the payment of monetary sanctions. The provision in section 1038, subdivision (a) directing that the trial court include the award of attorney fees in the *judgment* indicates that the award is intended to be treated for purposes of appeal as a part of the judgment rather than as an interlocutory order imposing sanctions.

section 1038. (*Olson v. Cory* (1983) 35 Cal.3d 390, 400-401; *Morehart, supra*, 7 Cal.4th at pp. 744-747; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 393-394.)[20] We do so because we will, in this opinion, be considering the trial court's decision to award attorney fees under section 1038 *as to Cal-Coast*, and that analysis will present the same issues as Jeld-Wen's challenge to the award in favor of AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall. The interests of fairness and judicial economy dictate that we permit AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall to participate in the resolution of those issues at this time. (See *Campbell v. Alger* (1999) 71 Cal.App.4th 200, 206 [when several parties sought review of an issue which was fully briefed, but the appeal was not cognizable as to some parties who lacked a final judgment, the court exercised its jurisdiction to treat the appeal as a petition for a writ of mandate to order to "determine the question presented on its merits as to all parties before us"]; *G. E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance Co.* (1992) 11 Cal.App.4th 318, 325 [concluding that since it "must resolve this single-issue appeal as to [one of the parties], the interests of judicial economy will be better served by resolving the issues as to all parties at this time" by treating the appeal as a petition for writ of mandate]; *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 60 [electing to treat appeal as to parties who did not possess a final

---

20 Although AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall, rather than Jeld-Wen, have asked us to treat the appeal as a petition for a writ of mandate, "[a] stipulation or agreement by the parties is not a prerequisite to this court's exercise of its discretion to treat the appeal as a writ proceeding." (*In re Albert B.* (1989) 215 Cal.App.3d 361, 372.)

judgment as a petition for a write of mandate, when the same appellate issues would be decided in the appeal as to other parties].) The matter is fully briefed by all of the relevant parties, and we thus elect to consider the issue now as to all the parties, instead of waiting for Jeld-Wen to perfect an appeal following the entry of a final judgment as to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall.

We now turn to the merits of Jeld-Wen's challenge to the trial court's decision to award attorney fees to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast under section 1038.

2. *Section 1038 Is Not Limited to Claims Brought Under the California Tort Claims Act*

Jeld-Wen argues that the trial court improperly awarded attorney fees under section 1038 because the statute purportedly applies only to claims brought under the California Tort Claims Act. According to Jeld-Wen, because this action did not assert such claims, the award of attorney fees was improper.

We reject this argument because it is contrary to the plain language of the statute. Section 1038 plainly states, in the disjunctive, that it applies "[i]n any civil proceeding under the California Tort Claims Act *or* for express or implied indemnity *or* for contribution in any civil action . . . ."[21] (§ 1038, subd. (a), italics added.) Case law has

---

21 Jeld-Wen contends that the legislative history for section 1038 establishes that the statute applies only to claims under the California Tort Claims Act. However, "we are precluded from considering the history where, as here, the language of the statute is clear on its face." (*County of Sacramento v. Llanes* (2008) 168 Cal.App.4th 1165, 1175.) "[I]f there is 'no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said,' and it is not necessary to 'resort to legislative history to determine the

applied section 1038 to private parties who prevailed in defeating claims for indemnity or contribution. (*Gonzales v. ABC Happy Realty, Inc.* (1997) 52 Cal.App.4th 391, 395 (*Gonzales*) [cross-defendant who obtained summary judgment against a claim for indemnity could obtain an award of defense costs incurred on appeal, in addition to those incurred in the trial court]; *Ford Motor Co. v. Schultz* (1983) 147 Cal.App.3d 941, 951 [affirming trial court's denial of motion for attorney fees under § 1038 by a cross-defendant who prevailed on summary judgment against a claim for indemnity because the cross-complaint was not filed in bad faith or without reasonable cause].) In this action, Jeld-Wen brought claims for equitable indemnity and equitable contribution. Thus, section 1038 is applicable even though Jeld-Wen did not bring claims under the California Tort Claims Act.

3. *Jeld-Wen Did Not Maintain the Action with Reasonable Cause*

Jeld-Wen also argues that we should reverse the award of attorney fees under section 1038 because the trial court erred in determining that Jeld-Wen did not have reasonable cause to maintain its causes of action for equitable contribution and equitable indemnity.

In enacting section 1038, "the Legislature intended that plaintiffs bring or maintain lawsuits *both* with reasonable cause *and* in good faith." (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 862 (*Kobzoff*).) Thus, "[t]o avoid

---

statute's true meaning.'" (*People v. Licas* (2007) 41 Cal.4th 362, 367.) We note also that although Jeld-Wen relies on legislative history for its argument, it has not cited to any legislative history documents in the appellate record.

an order to pay defense costs under section 1038, a plaintiff must have filed and pursued the action in good faith *and* with reasonable cause" (*Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 931), and "before denying a section 1038 motion, a court must find the plaintiff brought or maintained an action in the good faith belief in the action's justifiability *and* with objective reasonable cause." (*Kobzoff*, at p. 862, italics added.) "The 'good faith' and 'reasonable cause' requirements pertain not only to the action's initiation, but also its continued maintenance." (*Id*. at p. 853, fn. 1.) Put another way, "[s]ection 1038 applies not only to initiation of an action but also to steps to pursue it after it has been filed." (*Knight*, at p. 931.) Under section 1038, reasonable cause is "defined under an objective standard as '"whether any reasonable attorney would have thought the claim tenable."'" (*Kobzoff*, at p. 857.) "'*Reasonable cause* is to be determined objectively, as a matter of law, on the basis of the facts known to the plaintiff when he or she filed or maintained the action.'" (*Ibid*.)

Here, the trial court determined that Jeld-Wen brought the action in good faith, but after a certain period no longer had reasonable cause to maintain it. We apply a de novo standard of review to the trial court's determination that Jeld-Wen lacked reasonable cause to maintain the equitable indemnity and contribution action. (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 888 ["The standard of review of an award of attorney fees under . . . section 1038 is both de novo and substantial evidence. The 'reasonable cause' prong is reviewed de novo, and the 'good faith' prong is reviewed for substantial evidence"].)

We first review the trial court's ruling with respect to AIW, Wall and Pacific. As to those parties, the trial court pointed out that Jeld-Wen was not able to identify any evidence that they were responsible for water intrusion at the Project. The trial court ruled that as of August 31, 2006 — after Jeld-Wen's construction industry experts gave deposition testimony without indicating any evidence that AIW, Wall or Pacific performed substandard work that led to water intrusion at the Project — Jeld-Wen lacked reasonable cause to maintain the action against AIW, Wall and Pacific.

On our de novo review, we agree with the trial court's resolution of the issue as to Pacific and Wall, but not as to AIW. As we stated in the October 2008 opinion, Jeld-Wen has identified no evidence suggesting that either Pacific or Wall performed substandard work that caused water intrusion at the Project. Similarly, Jeld-Wen submitted no such evidence in opposition to Pacific's and Wall's section 1038 motions. Accordingly, we agree with the trial court that by the time of the deposition of Jeld-Wen's construction industry experts, Jeld-Wen did not have reasonable cause to maintain the action as to Pacific and Wall. However, with respect to AIW, as we explained in the October 2008 opinion, Jeld-Wen's expert Woodard submitted a declaration identifying the decorative iron railings as one source of water intrusion. Further, in opposition to AIW's section 1038 motion, Jeld-Wen submitted deposition testimony from Woodard and Linden identifying the decorative iron work as a cause of water intrusion. Thus, we do not agree with the trial court that after Jeld-Wen's construction industry expert gave deposition testimony, Jeld-Wen lacked reasonable cause to maintain an action against AIW. Instead AIW's section 1038 motion should be analyzed in the same manner as the

motions of the other subcontractors whom Jeld-Wen's experts opined caused water intrusion at the Project.

As to those subcontractors whom Jeld-Wen's experts opined were the cause of some of the water intrusion at the Project, the trial court concluded that Jeld-Wen did not have reasonable cause to maintain the action after Bryan's and Carlson's depositions. The trial court stated, "During discovery in this case the depositions of [Bryan] and [Carlson] were taken. Both testified that all invoices for repair costs unrelated to window water intrusion repairs were removed and that Pardee did not seek any costs other than those related to window repairs at trial. . . . [¶] Following the depositions of Bryan and Carlson it was clear there was no evidence that Jeld-Wen paid for repairs as a result of [the applicable subcontractor's] allegedly improper work. Consequently, at this point, Jeld-Wen had to have known that its case . . . was no longer tenable." Using either the date of June 12, 2006, or June 22, 2006, as the date on which those depositions were completed, the trial court concluded that Jeld-Wen lacked reasonable cause to maintain the action against Foshay, KAS, National Roofing, Southcoast and Cal-Coast after that date.

We thus analyze whether we agree with the trial court's ruling as to Foshay, KAS, National Roofing, Southcoast and Cal-Coast.

We first discuss National Roofing. That party is now differently situated because of the October 2008 opinion in which we reversed the judgment that National Roofing had obtained on the cause of action for equitable indemnity, ruling that a triable issue of material fact existed as to whether National Roofing was at fault for the leaking windows.

Our ruling reversing the summary judgment on the equitable indemnity cause of action has negated the basis for the trial court's ruling that Jeld-Wen lacked reasonable cause to maintain the action against National Roofing. Accordingly, the trial court's award of attorney fees to National Roofing under section 1038 can no longer stand.

The next issue is whether under an objective standard (see *Kobzoff, supra,* 19 Cal.4th at p. 857), Jeld-Wen or its attorneys should have realized, after taking Bryan's and Carlson's depositions, that the equitable indemnity and contribution claims were untenable as to Foshay, KAS, Southcoast, Cal-Coast and AIW.[22]

Jeld-Wen argues that the trial court erred in relying on Bryan's and Carlson's deposition testimony because its own experts were prepared to rebut that testimony and offer evidence to establish that some of the damages awarded in the Pardee judgment related to items other than window repairs. Gelman was Jeld-Wen's expert on that issue. Gelman's deposition was taken on September 7, 2006. As we have explained, Gelman's testimony and expert report are plainly insufficient to establish that any of the damages in the Pardee judgment were attributable to items other than window repairs. Indeed, based on our review, we conclude that any reasonable attorney would have known that Gelman's testimony was incompetent to rebut the statements made during Bryan's and Carlson's depositions. Thus, as of September 7, 2006, Jeld-Wen should have known that it could not rely on Gelman to establish that any of the damages in the Pardee judgment

---

22 As we explained above, the issue as to AIW should be analyzed similarly to the other Defendants whom Jeld-Wen's experts opined were at fault for water intrusion at the Project.

were attributable to the water intrusion allegedly caused by AIW, Foshay, KAS, Southcoast or Cal-Coast. However, before Gelman's September 7, 2006 deposition, Jeld-Wen or its attorneys still may have reasonably believed that Jeld-Wen might, through expert testimony, rebut the statements made during Bryan's and Carlson's deposition testimony. Accordingly, on our de novo review, we conclude that the trial court should have ruled that Jeld-Wen lacked reasonable cause to maintain its equitable indemnity and contribution causes of action as to AIW, Foshay, KAS, Southcoast and Cal-Coast after September 7, 2006.

4. *No Summary Judgment Is Currently in Place to Justify the Award of Attorney Fees Under Section 1038*

Under the procedural circumstances of this litigation, another issue arises which calls into question the propriety of the trial court's ruling awarding attorney fees under section 1038. The trial court granted attorney fees under section 1038 after AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast prevailed on *summary judgment*. However, the October 2008 opinion and this opinion reverse the judgment in favor of those parties on the ground that the trial court improperly granted the motions for judgment on the pleadings on the breach of contract cause of action.[23] The practical effect is that the *summary judgments* obtained by AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast are transformed into *summary*

---

[23] Further, as we have explained, we reversed the summary judgment in favor of National Roofing as to the equitable indemnity and declaratory relief causes of action, but affirmed it as to the equitable contribution cause of action, leaving National Roofing with what is in effect a summary adjudication on the equitable contribution cause of action.

adjudications, which dispose of less than all of the pending causes of action. (See Code Civ. Proc., § 437c, subd. (f)(1).) We are thus faced with the issue of whether the award of attorney fees under section 1038 may be permitted to stand when a prevailing defendant has obtained summary adjudication instead of summary judgment.

To address this question we first turn to the language of the statute. Section 1038 provides:

> "(a) In any civil proceeding under the California Tort Claims Act or for express or implied indemnity or for contribution in any civil action, the court, upon motion of the defendant or cross-defendant, shall, at the time of the granting of any summary judgment, motion for directed verdict, motion for judgment under Section 631.8, or any nonsuit dismissing the moving party other than the plaintiff, petitioner, cross-complainant, or intervenor, or at a later time set forth by rule of the Judicial Council adopted under Section 1034 determine whether or not the plaintiff, petitioner, cross-complainant, or intervenor brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint, petition, cross-complaint, or complaint in intervention. If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party. An award of defense costs under this section shall not be made except on notice contained in a party's papers and an opportunity to be heard.
>
> "(b) 'Defense costs,' as used in this section, shall include reasonable attorneys' fees, expert witness fees, the expense of services of experts, advisers, and consultants in defense of the proceeding, and where reasonably and necessarily incurred in defending the proceeding.
>
> "(c) This section shall be applicable only on motion made prior to the discharge of the jury or entry of judgment, and any party requesting the relief pursuant to this section waives any right to seek damages for

malicious prosecution. Failure to make the motion shall not be deemed a waiver of the right to pursue a malicious prosecution action.

"(d) This section shall only apply if the defendant or cross-defendant has made a motion for summary judgment, judgment under [Code of Civil Procedure s]ection 631.8, directed verdict, or nonsuit and the motion is granted."

The statute does not specifically refer to the granting of a defendant's motion for *summary adjudication* as one of the circumstances that triggers the right to file a motion for attorney fees. Instead, it refers only to motions for (1) summary judgment; (2) judgment under Code of Civil Procedure section 631.8;[24] (3) directed verdict; or (4) nonsuit. (§ 1038, subds. (a), (d).)

The Legislature could have specified that summary adjudications triggered the ability to bring a motion under section 1038, but it did not. At the time that the Legislature enacted section 1038 in 1980, the statute governing motions for summary judgment did not specifically use the words "summary adjudication," but it did refer to the ability of the court to adjudicate fewer than all of the issues raised in a summary judgment motion.[25] (Stats. 1973, ch. 366, § 2, p. 808.) Further, at the time it was

---

[24] Code of Civil Procedure section 631.8 provides that "[a]fter a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment." (Code Civ. Proc., § 631.8, subd. (a).)

[25] The statute stated, "If it appears that the proof supports the granting of such motion as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that such issues are without substantial controversy." (Stats. 1973, ch. 366, § 2, p. 808.)

enacted, section 1038 stated that a motion for attorney fees could be made "at the time of the granting of any summary judgment or nonsuit." (Stats. 1980, ch. 1209, § 1, p. 4088.) Section 1038 was amended in 1986 to specify, as it does currently, that a "motion for directed verdict" and a "motion for judgment under [Code of Civil Procedure s]ection 631.8" also triggers a plaintiff's ability to file a motion for attorney fees. (Stats. 1986, ch. 377, § 18, p. 1581.) In 1986, the summary judgment statute specifically referred to summary adjudication as an alternative type of motion adjudicating less than all of the issues in an action. (Stats. 1984, ch. 171, § 1, pp. 544-547.) When it amended section 1038 in 1986 to broaden the type of rulings that triggered the right to bring a motion for attorney fees (see Stats. 1986, ch. 377, § 18), the Legislature could have amended the statute to specify that an award of attorney fees could be made after a successful motion for summary adjudication, but the Legislature did not do so.[26] (See *Estate of McDill* (1975) 14 Cal.3d 831, 837-838 ["'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended'"].)

We accordingly conclude that a defendant may not bring a motion under section 1038 after prevailing on a motion for summary adjudication, but instead must

---

26 Although Defendants have presented sound policy reasons why it may have been prudent for the Legislature to include summary adjudication within the scope of the motions that trigger the ability to recover fees under section 1038, the Legislature did not do so, and we are bound to follow the statute as enacted.

wait until it obtains one of the rulings specified in section 1038, namely "the granting of any summary judgment, motion for directed verdict, motion for judgment under [Code of Civil Procedure] Section 631.8, or any nonsuit." (§ 1038, subd. (a).) Here, by virtue of the October 2008 opinion and our ruling as to Cal-Coast in this opinion, AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall and Cal-Coast have obtained summary adjudication rather than summary judgment. The ruling in favor of those parties under section 1038 must be vacated, as the premise for the trial court's ruling under section 1038 (i.e., success on a motion for summary judgment) no longer exists.

Accordingly, as to Cal-Coast we reverse and vacate the ruling awarding attorney fees under section 1038; as to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall we grant writ relief directing the trial court to vacate its order granting attorney fees under section 1038. In the event that AIW, Foshay, KAS, National Roofing, Pacific, Southcoast, Wall, or Cal-Coast prevail on summary judgment or another motion specified in section 1038 during further litigation of this action, any of them may bring another motion for attorney fees under section 1038.[27]

---

27 Upon any future motion under section 1038, the trial court may consider whether the defense costs "reasonably and necessarily incurred in defending the proceeding" (§ 1038, subd. (b)) include fees incurred during appellate proceedings in this action. (*Gonzales, supra,* 52 Cal.App.4th at p. 395.)

D. *Jeld-Wen's Challenge to the Trial Court's Award of Attorney Fees Under Section 1717*

Jeld-Wen's final argument is that the trial court erred in awarding attorney fees to Western, AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast under section 1717.

As with the appeal of the award of attorney fees under section 1038, we also lack jurisdiction over the appeal of the award of attorney fees under section 1717 due to the fact that no final judgment is in place with respect to Western, AIW, Foshay, KAS, Pacific, Southcoast and Wall. However, for the same reasons we cited above, we will treat the appeal of the award of attorney fees under section 1717 as a petition for a writ of mandate with respect to Western, AIW, Foshay, KAS, Pacific, Southcoast and Wall.

We therefore turn to the merits of the issue. As we will explain, we conclude that the award of attorney fees under section 1717 cannot stand as to AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast, but it was proper as to Western.

1. *AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast Are No Longer Prevailing Parties as Required for an Award of Attorney Fees Under Section 1717*

Western, AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast moved for an award of attorney fees under section 1717 based on the fact that they were prevailing parties on the breach of contract cause of action. The trial court awarded attorney fees on that basis, finding that Western, AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast were prevailing parties. However, the October 2008 opinion reversed the trial court's ruling granting judgment on the pleadings in favor of AIW, Foshay, KAS, Pacific,

Southcoast and Wall on the breach of contract cause of action, and this opinion reverses that same ruling as to Cal-Coast. AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast are no longer prevailing parties on the breach of contract cause of action. Therefore, the award of attorney fees to them premised on section 1717 cannot stand. (See *Southern Pacific Transportation Co. v. Mendez Trucking, Inc.* (1998) 66 Cal.App.4th 691, 696 ["Since we reverse the judgment below, respondent is no longer the prevailing party, and thus not entitled to attorney fees pursuant to . . . section 1717. Accordingly, the order awarding attorney fees is also reversed"].)

As to Cal-Coast we reverse the award of attorney fees under section 1717, and as to AIW, Foshay, KAS, Pacific, Southcoast, Wall we grant writ relief directing the trial court to vacate the award of attorney fees under section 1717. Our ruling is without prejudice to AIW, Foshay, KAS, Pacific, Southcoast, Wall and Cal-Coast bringing another motion for attorney fees premised on section 1717 in the event that they become prevailing parties on the breach of contract cause of action after further proceedings in the trial court.

2. *Attorney Fees Were Properly Awarded to Western Under Section 1717*

The October 2008 opinion did not reverse the judgment in favor of Western. Accordingly, we proceed to consider whether the trial court properly awarded attorney fees in favor of Western based on section 1717.

We apply a de novo standard of review to the trial court's determination that section 1717 justifies an award of attorney fees in this case. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677 (*Sessions*).)

The trial court awarded $56,734.44 in attorney fees to Western under section 1717. That provision states:

> "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (§ 1717, subd. (a).)

On appeal, Jeld-Wen does not challenge the amount of the fee award. Instead, it argues that section 1717 does not apply in this case because (1) the trial court determined that Jeld-Wen was not a third party beneficiary of Western's subcontract with Pardee (the Western/Pardee subcontract), and (2) Western purportedly did not incur any attorney fees because its defense costs were paid by its insurance carrier. As we will explain, we reject both of these arguments.

a. *Western Is Entitled to Attorney Fees Despite the Trial Court's Ruling that Jeld-Wen Is Not a Third Party Beneficiary of Western's Subcontract with Pardee*

We first address Jeld-Wen's argument that Western was not entitled to recover attorney fees under section 1717 because the trial court determined that Jeld-Wen was not a third party beneficiary of the Western/Pardee subcontract. Jeld-Wen argues, "Since Jeld-Wen, according to the [t]rial [c]ourt, could not be an intended beneficiary of the contract . . . , attorneys' fees should not have been awarded against Jeld-Wen under [section 1717]."

Our Supreme Court has explained that "[t]he primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee

provisions." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610.) "To ensure mutuality of remedy . . . , it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Santisas*, at p. 611.) This rule applies equally to a lawsuit between a signatory and nonsignatory to a contract. (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382.) Specifically, in a case such as this, "[w]here a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed." (*Ibid*. [awarding attorney fees to a signatory defendant who prevailed in a suit brought by a nonsignatory plaintiff who alleged breach of contract under a third party beneficiary theory].)

We thus turn to the question of whether Jeld-Wen would have been entitled to recover attorney fees under the Western/Pardee subcontract if it had prevailed in its breach of contract claim against Western. To address this question we focus on the provisions of Western/Pardee subcontract. The attorney fee provision in that agreement states: "In the event any legal action is instituted to enforce the provisions of this agreement, the prevailing party shall be entitled to receive reasonable attorneys' fees and costs." Jeld-Wen's breach of contract claim was a "legal action . . . instituted to enforce the provisions" of the Western/Pardee subcontract. The plain language of the attorney

fee provision does not limit the parties who may recover attorney fees to the parties to the contract, but instead refers to *any* legal action to enforce the contractual provisions. Thus, according to the attorney fee provision in the Western/Pardee subcontract, even though Jeld-Wen is not a contractual party, it would be entitled to receive reasonable attorney fees in the event it established that it was a third party beneficiary and prevailed on its claim against Western. Applying the principle of mutuality expressed in section 1717, Western is thus entitled to recover its attorney fees from Jeld-Wen because it was the prevailing party in the breach of contract cause of action.

Jeld-Wen argues that we should rely on *Sessions*, *supra*, 84 Cal.App.4th 671, 679-680, to conclude that Western was not entitled to an award of attorney fees under section 1717. As we will explain, we disagree.

In *Sessions*, a payroll services provider seeking to recover wages that it had paid to a subcontractor's employees sued the general contractor on a third party beneficiary theory to recover the wages, but the case was dismissed when the subcontractor prevailed in its demurrer. To assess whether the subcontractor was entitled to attorney fees under section 1717, *Sessions* followed the analysis we have set forth above and accordingly reviewed the provisions of the contract to determine whether the plaintiff would have been entitled to attorney fees if it had prevailed. (*Sessions*, *supra*, 84 Cal.App.4th at p. 679.) *Sessions* noted that the contract authorized the recovery of attorney fees by the prevailing party "'[i]n the event it becomes necessary for *either party* to enforce the provisions of this Agreement'" (*id.* at p. 676), and provided that "'[e]xcept as specifically prescribed herein, *this Agreement shall not create any rights of or confer any benefits*

upon, third parties.'" (*Ibid.*) Focusing on these provisions, *Sessions* concluded that the contract did not give the right to third parties to the contract to recover attorney fees in a suit brought to enforce the contractual provisions, and if the plaintiff had prevailed, it would not have been able to recover attorney fees. (*Id*. at pp. 680-681.)[28] Accordingly, under the principle of mutuality, the prevailing defendant in *Sessions* also was not entitled to seek attorney fees.

Because the decision in *Sessions* turned on the specific contractual language in that case, we do not find *Sessions* to be applicable here. Unlike in *Sessions*, the attorney fee provision in the Western/Pardee subcontract does not limit recovery of attorney fees to "either party" to the subcontract. In contrast, it is much broader, referring to the recovery of fees by the prevailing party in "any legal action" to enforce the contractual provisions. Further, unlike the contract in *Sessions*, the Western/Pardee subcontract does not disclaim an intention to confer rights or benefits on third parties. Because the contractual language in the Western/Pardee subcontract is different, *Sessions* is not controlling. (Cf. *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 343 [concluding that *Sessions* was inapplicable in determining whether a nonsignatory who sued under a third party beneficiary theory was entitled to attorney fees under section 1717 in that, unlike

---

28 Parsing the contractual language, *Sessions* stated that "'[e]ither' refers only to the two parties to the contract. . . . If they wanted to include someone else, their contract would have referred to 'any' party. Moreover, the word 'party' limits recovery of attorneys fees to a 'party' to the contract, reflecting the intent . . . to exclude non-signatories . . . from the scope of the attorney fee clause." (*Sessions, supra*, 84 Cal.App.4th at p. 681.)

the contract in *Sessions*, the contractual language at issue "makes no reference to a particular party to the contract bringing the suit" and does not "impose any limitation on third party rights"].)

b. *An Award of Attorney Fees Is Proper Even If Defense Costs Have Been Paid by the Prevailing Party's Insurance Carrier*

Jeld-Wen also argues that Western should not be able to recover its attorney fees under section 1717 because it allegedly did not incur any attorney fees in this action, as those fees were purportedly paid by Western's insurance carrier. We reject this argument for two reasons.

First, the factual predicate for Jeld-Wen's argument is missing because Jeld-Wen identifies no evidence in the record to establish that Western's attorney fees were paid by an insurance carrier.

Second, even if the record did contain such evidence, Jeld-Wen's argument fails because the law is clear that a party may recover attorney fees under section 1717 regardless of whether its attorney fees have been paid by an insurance carrier. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1410 [rejecting the appellant's argument that fees should not have been awarded under § 1717 because respondent's insurance carrier paid the attorney fees].) A plaintiff is "not entitled to avoid [its] contractual obligation to pay reasonable attorney fees based on the fortuitous circumstance that [it] sued a defendant who obtained insurance coverage providing a defense." (*Ibid*.) Under section 1717, our Supreme Court has "specifically rejected the contention . . . that attorney fees 'incurred'

means *only* fees a litigant actually pays or becomes liable to pay from his own assets." (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 374.)[29]

In sum, we conclude that the trial court properly awarded attorney fees to Western pursuant to section 1717.

DISPOSITION

The judgment is reversed with respect to (1) the ruling in favor of Cal-Coast on its motion for judgment on the pleadings challenging the breach of contract cause of action; and (2) the rulings awarding attorney fees to Cal-Coast under Code of Civil Procedure section 1038 and Civil Code section 1717.

Let a peremptory writ of mandate issue directing the trial court to vacate its order granting attorney fees under Code of Civil Procedure section 1038 to AIW, Foshay, KAS, National Roofing, Pacific, Southcoast and Wall. Further, let a peremptory writ of

---

29 The cases that Jeld-Wen relies on are inapposite, because none of them deal with section 1717. Instead, each discusses whether a plaintiff in a breach of contract action may recover, *as an item of damages*, attorney fees that it did not actually incur. (*Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468, 471-473; *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1089; *Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, 712.) Under section 1717, attorney fees are not awarded as damages, but instead as an item of costs. (§ 1717, subd. (a) ["Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit"].) Western did not claim attorney fees as an element of damages, but instead as an item of costs under section 1717.

mandate issue directing the trial court to vacate its order granting attorney fees under Civil Code section 1717 to AIW, Foshay, KAS, Pacific, Southcoast and Wall. In all other respects the judgment is affirmed. Each party is to bear its own costs.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.